Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 26 OCTOBER 28, 1992 No. 44

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

The decisions, rulings, notices, and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

(T.D. 92–99)

REVOCATION OF DRAWBACK CONTRACTS

The following Treasury Decisions, providing for the payment of drawback on articles manufactured or produced in the United States by the named entities, are revoked in accordance with 19 U.S.C. 1313, 19 CFR Part 177, and 19 CFR 177.9(d). This revocation is effective upon publication of this notice in the weekly edition of the CUSTOMS BULLETIN AND DECISIONS. The revocation is without prejudice to existing claims.

T.D. No.	*Name of claimant*
83–257–K	Howmet Turbine Components Corporation
83–257–O	Oregon Metallurgical Corporation
83–257–T	Teledyne Allvac

Dated: October 13, 1992.

JOHN DURANT,
Director,
Commercial Rulings Division.

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19 CFR Parts 19, 113, and 144

(T.D. 92–81)

RIN–1515–AA22

DUTY-FREE STORES; DELAY OF EFFECTIVE DATE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Delay of effective date.

SUMMARY: By a final rule document published as T.D. 92–81 in the Federal Register on August 20, 1992 (57 FR 37692), the Customs Regu-

lations were amended to designate duty-free stores as a new class of Customs bonded warehouse, to establish operating procedures for the administration of these facilities, and to incorporate such duty-free operating procedures into the regulations. These amendments were to have become effective on October 19, 1992.

However, Customs has now determined to reexamine several aspects of these regulations, in order to make certain that they are as effective as they can be in promoting the efficient operations of duty-free stores. Accordingly, in order to do this fairly, Customs finds it necessary to delay, until further notice, the effective date of the amendments pending a decision in this matter. Any determination to alter the final rule document will be handled in conformance with the applicable notice-and-comment requirements of the Administrative Procedure Act.

EFFECTIVE DATE: As of October 16, 1992, the effective date of the final rule published at 57 FR 37692 (August 20, 1992) is delayed until further notice.

FOR FURTHER INFORMATION CONTACT: Mike Brengle, Office of Cargo Enforcement and Facilitation, (202) 927–0510.

Dated: October 13, 1992.

KAREN J. HIATT,
Acting Assistant Commissioner,
Commercial Operations.

[Published in the Federal Register, October 16, 1992 (57 FR 47409)]

U.S. Customs Service

General Notice

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 12–1992)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of September 1992 follow. The last notice was published in the CUSTOMS BULLETIN on September 23, 1992.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, Room 2104, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 566–6956.

Dated: October 13, 1992.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The lists of recordations follow:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, THM OR MSK
COP9200296	19920901	20120901	PETITE PLIE PACKAGED STICKER SH
COP9200297	19920901	20120901	FAMILY VALUE DOLLS
COP9200298	19920908	20120908	TEEN TALK BARBIE DOLL HEAD
COP9200299	19920909	20120909	ROARING TOY SPACE GUN
COP9200300	19920909	20120909	SWEET SCOOTER WITH LADY RIDER
COP9200301	19920909	20120909	KITTY SURPRISE (KITTEN #12)
COP9200302	19920909	20120909	KITTY SURPRISE (KITTEN #10)
COP9200303	19920909	20120909	KITTY SURPRISE (KITTEN #9)
COP9200304	19920909	20120909	KITTY SURPRISE (KITTEN #8)
COP9200305	19920909	20120909	KITTY SURPRISE (KITTEN #4)
COP9200306	19920909	20120909	KITTY SURPRISE (KITTEN #3)
COP9200307	19920909	20120909	KITTY SURPRISE (KITTEN #2)
COP9200308	19920909	20120909	KITTY SURPRISE (KITTEN #1)
COP9200309	19920909	20120909	KITTY SURPRISE (KITTEN #7)
COP9200310	19920909	20120909	KITTY SURPRISE (KITTEN #11)
COP9200311	19920909	20120909	KITTY SURPRISE (KITTEN #5)
COP9200312	19920909	20120909	KITTY SURPRISE (MOM #4)
COP9200313	19920909	20120909	KITTY SURPRISE (MOM #7)
COP9200314	19920910	20120910	KITTY SURPRISE (MOM #10)
COP9200315	19920910	20120910	KITTY SURPRISE (MOM #11)
COP920031.	19920910	20120910	POUND PUPPIES - LICK 'N KISSES
COP9200317	19920910	20120910	POUND PUPPIES - LICK 'N KISSES
COP9200318	19920910	20120910	POUND PUPPIES - LICKS 'N KISSES
COP9200319	19920910	20120910	POUND PUPPIES - LICKS 'N KISSES
COP9200320	19920910	20120910	KITTY SURPRISE (KITTEN #6)
COP9200321	19920914	20120914	PATTERN NO. 8059
COP9200322	19920921	20120921	VGA BIOS VERSION 517
COP9200323	19920923	20120923	DRACULA
COP9200324	19920923	20120923	FRAUKENSTEIN
COP9200325	19920924	20120924	MURRY'S IRON WORKS 1987 SERIES
COP9200326	19920924	20120924	MURRY'S IRON WORKS 1987 SERIES
COP9200327	19920924	20120924	HANDCRAFTED CERAMIC DESIGNS BY
COP9200328	19920924	20120924	HANDCRAFTED CERAMIC BUTTONS BY
COP9200329	19920928	20120928	MIXED SUPER MILITARY HAULERS
COP9200330	19920928	20120928	MOMMY DOLLIE DOLL
COP9200331	19920929	20120929	LONESTAR BEAR

SERVICE
ED IN SEP 1992

PAGE 1
DETAIL

	OWNER NAME	RES
HEETS	SANRIO COMPANY, LTD.	N
	P.W. WOO & SONS, DBA ABC TOYS	N
	MATTEL, INC.	N
	HUA CHI TOYS CO., LTD.	N
	P.W. WOO & SONS DBA ABC TOYS	N
	HASBRO, INC.	N
	HASBRO, INC.	N
	HASBRO, INC.	N
	HASBRO, INC.	N
	HASBRO, INC.	N
	HASBRO, INC.	N
	HASBRO, INC.	N
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	HASBRO, INC.	N
	HASBRO, INC.	N
	HASBRO, INC.	N
	HASBRO, INC.	N
	HASBRO, INC.	N
S	HASBRO, INC.	N
S	HASBRO, INC.	N
	HASBRO, INC.	N
	CONCORD FABRICS, INC.	N
	WESTER DIGITAL CORPORATION	N
	UNIVERSAL PICTURES CORPORATION	N
	UNIVERSAL PICTURES CORPORATION	N
1 DESIGNS	MURRY'S IRON WORKS	N
1 DESIGNS	MURRY'S IRON WORKS	N
DEBRA RUTHERFORD	DEBRA RUTHERFORD	N
DEBRA J. RUTHERFORD	DEBRA RUTHERFORD	N
	P.W. WOO & SONS, INC. ABC TOYS	N
	P.W. WOO & SONS, INC. ABC TOYS	N
	OZ ENTERPRISES, INC.	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK
COP9200332	19920929	20120929	LEGEND OF ZELDA --GODS TROFORCE
COP9200333	19920929	20120929	NES OPEN TOURNAMENT GOLF
COP9200334	19920929	20120929	SOLAR STRIKER (GAME BOY)
COP9200335	19920929	20120929	SUPER MARIO WORLD (SUPER FAMICOM V
COP9200336	19920929	20120929	F-1 (GAME BOY)
COP9200337	19920929	20120929	DR. MARIO (GAME BOY)
COP9200338	19920929	20120929	SUPER MARIOLAND
COP9200339	19920929	20120929	RADAR MISSION (GAMEBOY VERSION)
COP9200340	19920929	20120929	TETRIS (GAME BOY)
COP9200341	19920929	20120929	DR. MARIO (NES VERSION)
COP9200342	19920929	20120929	TENNIS (GAME BOY)
COP9200343	19920929	20120929	SEWING MACHINE HANGER
COP9200344	19920929	20120929	WALTON
COP9200345	19920929	20120929	ARROWCOPTER TOY BLISTER CARD FRONT
COP9200346	19920930	20120930	ANGELICA ANGEL BATTENBURG TREE ORN
COP9200347	19920930	20120930	ANGEL
COP9200348	19920930	20120930	CAPTAIN COMMANDO
SUBTOTAL RECORDATION TYPE			53
TMK9200495	19920901	20050814	COKE STYLIZED
TMK9200496	19920901	20000906	SPRITE STYLIZED
TMK9200497	19920901	19970201	COKE BOTTLE DESIGN
TMK9200498	19920901	19970201	COKE RIBBON DESIGN
TMK9200499	19920903	20050727	DURACELL
TMK9200500	19920903	20070217	KNICKS AND DESIGN
TMK9200501	19920903	20050402	LEE KUM KEE
TMK9200502	19920903	20050618	HOUSE OF LEE AND DESIGN
TMK9200503	19920903	20010224	PANDA LOGO
TMK9200504	19920904	20100102	LEE KUM KEE CHOY SUN & CHINESE CHA
TMK9200505	19920903	20011201	LKK & DESIGN
TMK9200506	19920903	20000925	LEE KUM KEE COMPANY LIMITED & CHIN
TMK9200507	19920908	20080521	GOLDEN QILLA
TMK9200508	19920908	20080412	LAL QILLA
TMK9200509	19920908	20020506	BERNINA
TMK9200510	19920908	20010912	PACKARD BELL

	OWNER NAME	RES
	NINTENDO OF AMERICA INC.	N
	NINTENDO OF AMERICA INC.	N
	NINTENDO OF AMERICA INC.	N
VERSION)	NINTENDO OF AMERICA INC.	N
	NINTENDO OF AMERICA INC.	N
	NINTENDO OF AMERICA INC.	N
	NINTENDO OF AMERICA INC.	N
	NINTENDO OF AMERICA INC.	N
	NINTENDO OF AMERICA INC.	N
	NINTENDO OF AMERICA INC.	N
	NINTENDO OF AMERICA INC.	N
	MICHELL MARKETING, INC.	N
	CYRUS CLARK, CO.	N
IT AND BACK PACKAGE	RICHARD B. EVANOFF	N
RNAMENT ANGELS & BATTEN	WIMPOLE SREET, INC.	N
	WIMPOLE STREET, INC.	N
	CAPCOM CO., LTD.	N
	COCA-COLA COMPANY	N
	COCA-COLA COMPANY	N
	COCA-COLA COMPANY	N
	COCA-COLA COMPANY	N
	DURANAME CORPORATION	N
	MADISON SQUARE GARDEN CORPORATIO	N
	LEE KUM KEE COMPANY LIMITED	N
	LEE KUM KEE COMPANY LIMITED	N
	LEE KUM KEE COMPANY LIMITED	N
HARACTERS & DEVICE DESI	LEE KUM KEE COMPANY LIMITED	N
	LEE KUM KEE COMPANY LIMITED	N
INESE CHARACTERS & DESI	LEE KUM KEE COMPANY LIMITED	N
	AMAR SINGH CHAWAL WALA	N
	AMAR SINGH CHAWAL WALA	N
	FRITZ GEGAUF AKTIENGESELLSCHAFT	N
	PACKARD-BELL ELECTRONICS, INC.	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK
TMK9200511	19920909	20020505	MICRO-HEAT
TMK9200512	19920909	20020526	AT&T AND DESIGN
TMK9200513	19920909	20051203	LANCETTI AND DESIGN
TMK9200514	19920914	20040807	DIVER DESIGN
TMK9200515	19920914	20000320	UNISA
TMK9200516	19920914	20050101	UNISA
TMK9200517	19920914	20120914	AJI-NO-MOTO AND DESIGN
TMK9200518	19920923	20011221	CROSS
TMK9200519	19920923	20010105	LANGE
TMK9200520	19920928	20120414	HARLEY
TMK9200521	19920928	20060121	SARABETH
TMK9200522	19920928	20020609	SUPER NINTENDO ENTERTAINMENT S
TMK9200523	19920928	20020609	VIEW BOY
TMK9200524	19920929	20060701	ALPINE
TMK9200525	19920929	20011210	ALPINE DESIGN
TMK9200526	19920929	20051217	ALPINE
TMK9200527	19920929	20051112	ALPINE
TMK9200528	19920929	20010630	ALPINE
TMK9200529	19920929	20051001	ALPINE
TMK9200530	19920929	20001106	ALPINE DESIGN
TMK9200531	19920929	20011119	VPS
TMK9200532	19920929	19951203	LIGO WITH DESIGN
TMK9200533	19920929	20000109	VIA BRERA
TMK9200534	19920929	20091003	GLACE'E
TMK9200535	19920929	20050716	STUDIO PAOLO
TMK9200536	19920930	20060603	BACH FLOWER REMEDIES
TMK9200537	19920930	20011121	INNER RIM OF LOCK NUT
TMK9200538	19920930	20011121	ESHA
TMK9200539	19920930	19950906	INNER RIM OF LOCK NUT
TMK9200540	19920930	19960207	INNER RIM OF LOCK NUT

SUBTOTAL RECORDATION TYPE 46

TOTAL RECORDATIONS ADDED THIS MONTH 99

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DETAIL

	OWNER NAME	RES
	CARA, INC.	N
	AMERICAN TELEPHONE AND TELEGRAPH	N
	LANCETTI CREAZIONI S.R.L.	N
	N.S.W. ABALONE DIVERS CO-OPERATI	N
	UNISA AMERICA, INC.	Y
	UNISA AMERICA, INC.	Y
	AJINOMOTO KABUSHIKI KAISHA	N
	A.T.X. INTERNATIONAL, INC.	N
	LANGE INTERNATIONAL S.A.	N
	HARLEY-DAVIDSON, INC.	N
	SARABETH'S KITCHEN, INC.	N
SYSTEM	NINTENDO OF AMERICA, INC.	N
	NINTENDO OF AMERICA, INC.	N
	ALPINE ELECTRONICS INC.	N
	ALPINE ELECTRONICS INC.	N
	ALPINE ELECTRONICS INC.	N
	ALPINE ELECTRONICS INC.	N
	ALPINE ELECTRONICS INC.	N
	ALPINE ELECTRONICS INC.	N
	ALPINE ELECTRONICS INC.	N
	LEVI, RAY & SHOUP, INC.	N
	LIBERTY GOLD FRUIT CO. INC.	Y
	INTERSHOES, INC.	Y
	INTERSHOES, INC.	Y
	INTERSHOES, INC.	Y
	ELLON BACH U.S.A., INC.	Y
	HARVARD INDUSTRIES INC	Y
	HARVARD INDUSTRIES INC	Y
	HARVARD INDUSTRIES INC	Y
	HARVARD INDUSTRIES INC	Y

U.S. Customs Service

Proposed Rulemakings

19 CFR Part 101

CONSOLIDATION OF NORFOLK AND NEWPORT NEWS, AND RICHMOND-PETERSBURG, VIRGINIA, FOR MARINE PURPOSES; EXTENSION OF TIME FOR COMMENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Extension of time for comments.

SUMMARY: This notice extends the period of time within which interested members of the public may submit comments concerning the proposed consolidation of the ports of entry of Norfolk and Newport News, and Richmond-Petersburg, Virginia for marine purposes only. Customs has been requested to extend the comment period to allow additional time to prepare responsive comments. The comment period is extended until November 20, 1992.

DATES: Comments are requested on or before November 20, 1992.

ADDRESSES: Comments may be submitted to and inspected at the Regulations Branch, U.S. Customs Service, Room 2119, 1301 Constitution Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Margaret Reyen, Office of Workforce Effectiveness and Development, (202) 927–1413.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 10, 1992, a document was published in the Federal Register (57 FR 35530), proposing to consolidate the ports of entry of Norfolk and Newport News, and Richmond-Petersburg, Virginia for marine purposes only. The document invited the public to comment on the proposed consolidation. Comments were to have been received on or before October 9, 1992.

Customs has been requested to extend the period of time for comments in order to afford interested parties additional time to study the proposed change and prepare responsive comments. Customs believes

that the request for an extension of time should be granted. Accordingly, Customs is extending the period of time for comments to be submitted on the proposed consolidation until November 20, 1992.

Dated: October 14, 1992.

SAMUEL H. BANKS,
Assistant Commissioner,
Commercial Operations.

[Published in the Federal Register, October 19, 1992 (57 FR 47583)]

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19 CFR Part 10

TEMPORARY IMPORTATION BONDS; EXPORTATION, DESTRUCTION, AND CANCELLATION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to eliminate the requirement of having exporters file a CF 3495, Notice of Exportation, under a temporary importation bond, thus eliminating the requirement of notice except whenever Customs specifically requires such. The Customs Service proposes to accept any generally accepted foreign documents of exportation at any of the ports of exportation, including the original port of entry. Customs would retain the right to periodically examine merchandise although the exporter would no longer be required to file a notice of intent to export. It is believed that this amendment would facilitate the movement of export cargo through United States Customs ports and reduce the paperwork associated with it.

DATE: Comments must be received on or before December 18, 1992.

ADDRESS: Written comments (preferably in triplicate) may be addressed to and inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, 1301 Constitution Avenue, NW, Room 2119, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Bruce Friedman, Office of Trade Operations, 202–927–0916.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 10.38(a) of the Customs Regulations (19 CFR 10.38(a)), currently requires that with articles entered and exported under chapter

98, subchapter XIII, Harmonized Tariff Schedule of the United States (HTSUS) (19 U.S.C. § 1202), an application on Customs Form 3495 must be filed in duplicate with the district director at the port of entry a sufficient time in advance of exportation to permit the examination and identification of the articles if circumstances warrant. Section 10.38(c) requires that if exportation is done at a port other than the port of entry, the CF 3495 must be filed in triplicate at the port of exportation, and a certified copy of the import entry or a certified copy of the invoice on that entry must also be filed. Filing in triplicate is also required if the goods are examined at one port and exported through another (See 19 CFR 10.38(d)).

Section 10.39(e)(3) of the Customs Regulations (19 CFR 10.39(e)(3)) requires that if an article was entered under a temporary importation bond (TIB) and was exported or destroyed within the period of time during which the article may remain in the U.S. Customs territory under bond but not under Customs supervision, and satisfactory documentary evidence of actual exportation such as a foreign landing certificate, or of death or other complete destruction, such as a veterinarian's certificate or certificates of two disinterested witnesses, are furnished together with a complete explanation by the applicant of the failure to obtain Customs supervision, the district director in this case may demand payment in a lesser amount than the amount posted on bond if the district director is satisfied that the circumstances surrounding the exportation or destruction precluded any arrangement to obtain Customs supervision. If a carnet was involved, the satisfactory documentary evidence would include the particulars regarding the importation or reimportation entered in the carnet by the Customs authorities of another contracting party or a certificate with respect to importation or reimportation issued by those authorities based on the particulars shown on a voucher which was detached from the carnet on importation or reimportation into their territory, provided it is shown that the importation or reimportation took place after the exportation which it is intended to establish.

Customs is proposing in this document to allow exporters of merchandise under sections 10.38 and 10.39(e)(3) to submit as proof of exportation any satisfactory documentary evidence of exportation to facilitate exportation procedures. Such evidence would include, but not be limited to, bills of lading, air waybills, freight waybills, cargo manifests, or certified copies of the same, issued by the exporting carrier. The documentary evidence must show the following: 1) the name of exporting vessel or other carrier; 2) the date of exportation; 3) the name of the exporter; 4) the country of ultimate destination; and 5) the description of merchandise, including weight, gauge, measure, and/or number. This document also proposes to remove the requirement that the CF 3495 be filed whenever TIB merchandise is to be exported at a port other than the port of entry. In such cases, delivery of the merchandise directly to the carrier would be allowed and the exporter would subsequently provide

Customs with documents proving actual exportation, such as the foreign landing certificate or a translated copy of the foreign customs entry document. If examination of the cargo is needed, it would be done in the same manner as is currently done for export cargo not requiring the CF 3495. The exporter would be required to submit the pertinent documentary evidence to the Customs port maintaining the entry to verify the export and allow for the timely closing of the entry.

Customs would continue to retain the right to examine merchandise exported under these provisions in spite of the fact that the exporter would no longer be required to give notice of intent to export in every case. Consequently, Customs may periodically notify exporters that notice of intent to export is required for a pre-determined length of time.

Customs believes that by eliminating the requirements of filing CF 3495 and notice of intent to export before exportation, except in certain circumstances, the movement of export cargo will be facilitated and the number of documents to be submitted to Customs would be reduced. Customs also believes that the manpower needed to review the program would be reduced as well as the number of claims for liquidated damages assessed for merchandise that has actually been exported but no application for examination was made and the exportation was not under Customs supervision.

In accordance with the above discussion, amendments are being proposed to §§ 10.38 and 10.39(e)(3), Customs Regulations (19 CFR 10.38 and 10.39(e)(3).

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. § 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, U.S. Customs Service Headquarters, 1301 Constitution Avenue, N.W., Room 2119, Washington, D.C.

REGULATORY FLEXIBILITY ACT

Based on the above discussion and pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. § 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. § 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Anthony L. Shurn, Entry Rulings Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

SUBJECT LISTED UNDER 19 CFR PART 10

Customs duties and inspection; Exportation.

PROPOSED AMENDMENTS

It is proposed to amend Part 10, Customs Regulations (19 CFR Part 10), as set forth below.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation for Part 10 would continue to read as follows:

Authority: 19 U.S.C. 66, 1202, 1481, 1484, 1498, 1508, 1623, 1624; * * *

* * * * * * *

2. It is proposed to amend § 10.38, by revising paragraphs (a), (c), and (d), to read as follows:

§ 10.38 Exportation.

(a) Articles entered under chapter 98, subchapter XIII, Harmonized Tariff Schedule of the United States (HTSUS) (19 U.S.C. 1202) may be exported at the port of entry or at another port. Proof of exportation shall be filed with the district director which shall consist of any generally accepted business documentation which indicates the following: the name of the exporting vessel or other carrier, the date of exportation, the name of the exporter, the country of ultimate destination, and description of merchandise, including weight, gauge, measure, or number when appropriate. The documentary evidence shall be filed with the district director within a reasonable length of time after actual exportation to allow for timely closing of the entry. If a carnet was used for entry purposes, the reexportation voucher of the carnet shall be filed along with the satisfactory documentary evidence, and the carnet shall be presented for certification.

* * * * * * *

(c) If exportation is made at a port other than the one at which the merchandise was entered, the documentary evidence referred to in paragraph (a) shall be filed in duplicate. There shall also be filed with the evidence a certified copy of the import entry or a certified copy of the invoice used on entry.

(d) At the discretion of the district director, an exporter may be required to periodically give written notice of intent to export for a pre-determined length of time to allow for examination. If the goods are examined at the direction of the district director at one port and are to be

exported from another port, they shall be forwarded to the port of exportation under a transportation and exportation entry. Articles entered under a carnet shall not be examined elsewhere than at the port from which they are to be exported.

* * * * * * *

3. It is proposed to revise § 10.39(e)(3) to read as follows:

§ 10.39 Cancellation of bond charges.

* * * * * * *

(e) * * *

(3) If the article was destroyed within the period of time during which the articles may remain in the Customs territory of the United States under bond but not under Customs supervision and satisfactory evidence of death or other complete destruction are furnished together with a complete explanation by the applicant of the failure to obtain Customs supervision, upon payment of such lesser amount as the district director may deem appropriate under the law and in view of the circumstances, or without the collection of liquidated damages if the district director is satisfied that the merchandise was destroyed under circumstances which precluded any arrangement to obtain Customs supervision. Satisfactory documentary evidence of death or other complete destruction includes documents such as a veterinarian's certificate or certificates of two disinterested witnesses. Satisfactory documentary evidence of exportation, in the case of carnets, would include the particulars regarding importation or reimportation entered in the carnet by the Customs authorities of another contracting party, or a certificate with respect to importation or reimportation issued by those authorities, based on the particulars shown on a voucher which was detached from the carnet on importation or reimportation into their territory, provided it is shown that the importation or reimportation took place after the exportation which it is intended to establish. In cases where the district director has required that notice of intent to export be given, liquidated damages may be collected when the director does not find the evidence of exportation to be satisfactory or none is filed at all within a reasonable length of time as referred to in section 10.38(a).

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: October 13, 1992.
PETER K. NUNEZ,
Assistant Secretary of the Treasury (Enforcement).

[Published in the Federal Register, October 19, 1992 (57 FR 47582)]

U.S. Court of Appeals for the Federal Circuit

GENERAL MOTORS CORP., PLAINTIFF-APPELLEE *v.*
UNITED STATES, DEFENDANT-APPELLANT

Appeal No. 91–1518

(Decided October 8, 1992)

Joseph S. Kaplan, Ross & Hardies, of New York, New York, argued for plaintiff-appellee. With him on the brief was *Michelle F. Forte,* of counsel.

Saul Davis, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellant. With him on the brief were *Stuart M. Gerson,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office. Also on the brief was *Steven Berke,* Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, of counsel.

Appealed from: U.S. Court of International Trade.
Judge TSOUCALAS.

Before NIES, *Chief Judge,* ARCHER and MAYER, *Circuit Judges.*

MAYER, *Circuit Judge.*

The government appeals the judgment of the Court of International Trade, 770 F. Supp. 641 (1991), that certain motor vehicle components are eligible for the trade allowance provided in item 807.00, Tariff Schedules of the United States (TSUS), despite a contrary determination by the United States Customs Service. We reverse.

BACKGROUND

During 1986 and 1987, General Motors Corporation (GM) manufactured in the United States various sheet metal components for use in the production of motor vehicles. These components were shipped to Mexico and assembled, along with other components, into finished vehicles in GM's Ramos Arizpe assembly plant.

The Ramos Arizpe assembly process is described as consisting of five operation groups: body shop, paint shop, chassis line, trim shop, and final process. In the first group, body shop, major component subassemblies are fitted together and spot welded to create the body of the automobile. In the second group, paint shop, the body is cleaned and sprayed with a protective zinc phosphate compound, submerged in an electro deposition primer tank, baked, sanded, treated with a sealant, and then baked again. This is followed by an application of surface primer. At this point, topcoat (finish) paint is applied and the body is oven cured. Finally the body is waxed and sent along to the trim shop.

In the trim shop, certain internal components are installed and water testing is performed. Next, in chassis, while the radiator, grille, and gas tank are attached to the body, the engine, transmission, and frame are independently subassembled on a separate conveyor. The body and frame are then joined, and the bumpers, radiator, and tires are installed. The last operation is final process wherein manual detail work, sundry inspections, wheel alignment, and final drive tests are performed. The finished vehicle is then reshipped to the United States for sale.

Upon the re-entry of the vehicles at issue here into the United States, GM sought a tariff allowance for the value of the sheet metal components manufactured in the United States, in accordance with item 807.00, TSUS. Customs granted allowances on some of the components, but, in accordance with its regulation*, denied the allowance to components that had undergone topcoat (finish) painting, because:

> Finish painting vehicle parts is not of such a minor nature as to be considered incidental to the main assembly process. * * * [F]inish painting amounts to a fabrication that advances the vehicles in value and condition, beyond the meaning of [item 807.00].

After denial of its administrative protest, *see* 19 U.S.C. § 1514 (1988), GM filed suit in the Court of International Trade challenging Customs' denial of the trade allowance on the disputed components. *See* 28 U.S.C. § 1581(a) (1988).

On July 23, 1991, the court entered judgment in favor of GM, holding that the topcoat painting operations were minor and clearly subordinate to the assembly process and, accordingly, were "incidental to assembly" as required for item 807.00 treatment. 770 F. Supp. at 648. The court ordered Customs to reliquidate the entries and refund excess duties paid, with interest, to GM. *Id.* at 642.

DISCUSSION

Item 807.00, TSUS (1986), provides that:

> Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting [are subject to] [a] duty upon the full value of the imported article, less the cost or value of such products of the United States * * *.

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* 19 C.F.R. § 10.16 (1986), in relevant part, provides:

> (c) *Operations not incidental to the assembly process.* Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article. The following are examples of operations not considered incidental to the assembly as provided under item 807.00, Tariff Schedules of the United States (19 U.S.C. 1202):
>
> * * * * * * *
>
> (3) Painting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics * * *.

Accordingly, domestic components exported for assembly and reshipped to the United States, which conform to the requirements of each subpart of item 807.00, are eligible for a trade allowance upon re-entry in an amount equal to their cost or value.

In this case, there is no question that the disputed sheet metal components were exported in condition ready for assembly without further fabrication (807.00(a)) and have not lost their physical identity in the finished motor vehicles (807.00(b)). Furthermore, the components have "been advanced in value or improved in condition abroad" by the painting operations performed in GM's Ramos Arizpe assembly plant, as contemplated by 807.00(c). Therefore, in determining whether the components qualify for the item 807.00 trade allowance, the dispositive issue is whether the painting operations fall within the scope of "operations incidental to the assembly process such as cleaning, lubricating, and painting."

GM suggests that this issue can be resolved solely by the plain language of the statute. It contends that item 807.00 "expressly enumerates painting as an acceptable operation incidental to assembly * * * [and] explicitly cover[s] the operation at issue here." We disagree. The statute's reference to "painting" is simply an exemplar of an operation which is potentially "incidental to the assembly process," not a definitive statement that all painting operations, no matter how extensive, are allowed under item 807.00(c). This interpretation is fully supported by the statute's legislative history, as set out in *United States v. Mast Indus., Inc.*, 668 F.2d 501, 505 (CCPA 1981):

> The amended item 807.00 would specifically permit the U.S. component to be advanced or improved "by operations incidental to the assembly process such as cleaning, lubricating, and painting." It is common practice in assembling mechanical components to perform certain incidental operations which cannot always be provided for in advance. For example, in fitting the parts of a machine together, it may be necessary * * * *to paint* or apply other preservative coatings * * * *Such operations, if of a minor nature incidental to the assembly process,* whether done before, during, or after assembly, would be permitted even though they result in an advance in value of the U.S. components in the article assembled abroad.

H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965) (emphasis added). Thus, contrary to GM's suggestion, the mere fact that the disputed operations involve painting does not resolve this appeal. Instead, we must focus on whether the operations are "incidental to the assembly process" within the meaning of item 807.00(c).

Whether particular operations are "incidental to the assembly process" has been at issue before. *See, e.g., Mast*, 668 F.2d 501; *United States v. Oxford Indus., Inc.*, 668 F.2d 507 (CCPA 1981); *Miles v. United States*, 567 F.2d 979 (CCPA 1978). In *Mast*, the court had to determine whether buttonholing and pocket slitting operations performed upon fabric components were incidental to the assembly of women's pants under item 807.00(c). After rejecting arguments that these operations were pre-

cluded merely because they provided "independent utility" or were not essential to the assembly process, the court concluded that "operations [such] as applying preservative coatings and testing and adjusting the components are incidental to the assembly process '*if of a minor nature.*'" 668 F.2d at 506 (emphasis added); *see also Oxford,* 668 F.2d at 510. As a means of ascertaining whether "an operation of a 'minor nature' is incidental to the assembly process," the court set out the following factors:

> (1) Whether [i] the cost of the operation relative to the cost of the affected components and [ii] the time required by the operation relative to the time required for assembly of the whole article were such that the operation may be considered "minor." * * *
> (2) Whether the operations in question were necessary to the assembly process * * *.
> (3) Whether the operations were so related to assembly that they were logically performed during assembly.

Mast, 668 F.2d at 506. But because it identified these as "[r]elevant factors in this case," *id.,* we do not read *Mast* as announcing factors that must invariably be used to the exclusion of all others, or that all such factors are pertinent in every case involving item 807.00. We believe "Congress intended a balancing of all relevant factors to ascertain whether an operation of a 'minor nature' is incidental to the assembly process." *Id.* We see this balancing process as an objective way to decide if particular operations are minor and incidental to assembly.

In applying the first part of the first *Mast* factor, the trial court said,

> The *Mast* court unambiguously stated that it compared the "cost of the [challenged] operation relative to the cost of the affected component and the time required by the operation relative to the time required for assembly of the whole article." 69 CCPA at 54, 668 F.2d at 506.
> With reference to what operations are "challenged", there is no doubt that all of the operations performed in the paint shop are *not* at issue herein. Customs itself noted in its rulings that the preservative coating operations that make up the rest of the paint shop operations were in conformity with the spirit of item 807.00. Therefore, for defendant to now demand the use of cost and time figures of *all* paint shop operations when performing *Mast* comparisons is irrational. Only the figures directly attributed to the challenged finish painting operations will render a truthful computation of whether the operation is indeed of a minor nature.

770 F. Supp. at 645. The court was correct that Customs allowed GM a trade allowance on components that underwent preservative coating operations, but this appeal involves different components, those which were also subjected to topcoat painting, on which a trade allowance was denied. Accordingly, we believe that all coating operations performed upon the disputed components, including zinc phosphate, electro deposition primer, sealant, surface primer, sanding, baking, and waxing operations, are relevant and must be considered in conjunction with

topcoat painting operations to determine if coating operations, collectively, are minor incidents to assembly. The piecemeal analysis adopted by the trial court undermines item 807.00 by allowing major and significant operations to be broken down to a point where each step could be called minor. The court focused on its finding that "the cost of topcoating is but a fraction, *i.e.* 14%, of the cost of the affected components." *Id.* at 646. But the appropriate cost comparison, encompassing all paint shop operations and using GM's own cost data, reveals that coating operations are nothing if not major.

In applying the second part of the first *Mast* factor, the trial court observed that "the time expended in the topcoating operations accounts for less than four [standard labor hours] out of a total assembly time of over thirty-nine [standard labor hours]." *Id.* This time comparison, like the cost comparison, improperly excludes relevant coating operations. Nevertheless, while the comparison of labor hours, or total time of the operation, undoubtedly is relevant in some cases, where the operations are complex and involve significantly automated or non-labor processes (such as baking), this factor provides little guidance on whether operations are of a "minor nature." It is entitled to little weight in this case.

On the remaining *Mast* factors, the trial court held that "[GM] has painstakingly demonstrated that for reasons of economics as well as design, the topcoating operation is most logically performed during the assembly process." *Id.* We see nothing wrong with this finding, but it does not save the case for GM.

The record demonstrates that GM's cost data on coating operations is significantly understated because its accounting methods do not fairly allocate the cost of paint shop equipment to the cost of the paint shop operations. Under GM's accounting methods, depreciation costs are allocated to each department on the basis of the standard labor hours expended in the department, not on the basis of the actual capital investment. Accordingly, this does not fairly allocate the real costs of equipment, notwithstanding that "this method of reporting time and cost is a standardized method in cost accounting for assembly operations" and is "authorized by GAAP," according to GM.

We therefore believe capital investment in paint shop operations, compared with investment in the assembly processes, is relevant in deciding whether the operations at issue are of a minor nature. GM's data shows that the capital investment in machinery and equipment in the paint shop is more than five times that in the body shop, where significant assembly operations are performed. In sum, proper application of the first *Mast* factor, and consideration of overlooked information, confirms that the paint shop operations are not within the scope of item 807.00(c).

CONCLUSION

Accordingly, the judgment of the Court of International Trade is reversed.

COSTS

General Motors Corporation shall bear the costs of this appeal.

REVERSED

NIES, *Chief Judge,* dissenting.

This case involves sheet metal components manufactured by General Motors in the United States and shipped to Mexico where they and numerous other components were assembled into automobiles. Upon reentry of the automobiles into the United States, General Motors sought to subtract the value of the sheet metal components made in the United States from the full value of the automobiles in calculating the duty owed for importing the automobiles under item 807.00, TSUS (1986). Item 807.00 permits such a duty allowance for components made here which:

> (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity * * * by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting.

Item 807.00. The United States Customs Service denied allowances for sheet metal components which had been subject to topcoat painting operations in Mexico. The Court of International Trade disagreed and held that topcoating components in Mexico did not negate the deduction of the value of these parts as United States components. I agree.

The only question presented on appeal is whether the topcoated automobile components at issue have been advanced in value or improved in condition abroad by "operations incidental to the assembly process *such as cleaning, lubricating, and painting.*" Item 807.00(c) (emphasis added). At the government's urging, the majority has looked to item 807.00's legislative history and the Court of Customs and Patent Appeals opinion in *United States v. Mast Indus.*, 668 F.2d 501 (CCPA 1981), to require that the painting operations in this case be *minor* in nature as well as "incidental to the assembly process."

Item 807.00(c) speaks of "operations incidental to the assembly process such as * * * painting." Looking to this seemingly unambiguous language, the proper inquiry in this case is whether the painting operations performed in Mexico were "incidental to the assembly process." While the majority opinion states that painting is merely listed as "an exemplar of an operation which is potentially 'incidental to the assembly process,'" item 807.00's specific mention of painting is at minimum a

strong indication that the type of painting in issue is the exact type of activity 807.00 was amended to allow.

The government and the majority opinion look to our predecessor court's opinion in *Mast* as support for the requirement that the painting be "minor in nature." The operations in *Mast* were buttonholing and pocket slitting performed on fabric, operations not specifically mentioned in 807.00. The court looked to 807.00's legislative history in order to determine whether these operations were "incidental to the assembly process" under item 807.00(c). Such a resort to item 807.00's legislative history is not necessary in the present case – the plain language of item 807.00 governs the proper inquiry. *See United Stated v. Turkette*, 452 U.S. 576, 580 (1981).

In any event, to the extent that it is necessary to look to legislative history in order to further illuminate this seemingly clear provision, 807.00's legislative history explicitly names incidental painting as an operation which does not negate a duty allowance for imported components. In connection with amending 807.00 to allow the performance of certain value enhancing operations abroad, the legislative history states, "It appears that under the language of [pre-amendment] item 807.00 *minor operations such as painting incidental to assembly* abroad may be precluded, and that in certain respects the item is ambiguous, with the result that it imposes undue administrative burdens on customs officers." H.R. Rep. No. 342, 89th Cong., 1st Sess. 48 (1965) (emphasis added). Even assuming, *arguendo*, that an operation must be minor in nature to allow a duty allowance, 807.00's legislative history clearly implies, if not directly states, that painting which is incidental to assembly is inherently a minor operation.

If there is any doubt as to where the proper inquiry lies it is dispelled by close examination of the following factors used by the *Mast* court:[1] (1) whether the cost of the operation relative to the cost of the affected component and the time required by the operation relative to the time required for assembly of the whole article were such that the operation may be considered minor; (2) whether the operations were necessary to the assembly process; (3) whether the operations were so related to assembly that they were logically performed during assembly; and (4) whether economic or other practical considerations dictate that the operations be performed concurrently with assembly. 668 F.2d at 506 & n.7.

The first factor focuses solely on the extent of the operations, *i.e.*, whether the operations are "minor in nature," and forms the basis for the majority's opinion.[2] Concededly, an operation's being minor in na-

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[1] It is interesting to note that, in addition to item 807.00's plain language and legislative history, the judicial interpretation of 807.30 in *Mast* speaks of painting as an operation allowable under 807.00(c). 668 F.2d at 505.

[2] In addition to the "cost of the operation" and the "time required by the operation" elements under the first *Mast* factor, the majority looked to the amount of General Motor's capital investment in the machinery and equipment in the paint shop. I fail to see how the purchase of expensive capital equipment for whatever reasons, i.e., to increase efficiency, to cut labor costs, or to reduce employee's exposure to unsafe working conditions, changes the nature of the operation.

ture clearly impacts upon its being "incidental to the assembly process." A very minor operation is likely to be incidental to the assembly process. This factor, however, does not stand alone as dispositive; it is to be combined with the other three *Mast* factors and any other relevant considerations in determining whether an operation fits within those allowed under 807.00(c). The remaining three factors in *Mast* focus on the relationship between the operation and the assembly process in order to determine to what extent the assembly process dictated that the operation be performed abroad with the assembly. I believe these three factors lie at the heart of the inquiry in the present case.

The government suggests that the sheet metal components could have been painted in the United States and assembled in Mexico by "a nut and bolt assembly". This suggestion is so ludicrous I would have held the appeal frivolous. The process of nut and bolt automotive assembly became obsolete in the 1950's with the advent of spot welding. General Motors has clearly established that the painting operations had to be performed during the assembly process in Mexico. The components could not be painted (either undercoated or topcoated) prior to shipment to Mexico because the parts were assembled through electrical welding and the non-conductive paint would have, therefore, prevented assembly. The components could not be undercoated after the complete car was assembled because all of the sheet metal components must be undercoated in order to prevent corrosion. Likewise, the sheet metal components could not be undercoated in Mexico and topcoated (a la Earl Schieb) after importation of the automobile because: (1) the windshields were attached by adhesives which bonded only to topcoat, (2) a delay in topcoating would increase ultra violet degradation of the undercoats, and (3) trim components would have to have been removed to paint all of the surfaces which need to be topcoated. The nature of the assembly process dictated that the painting operations be performed concurrently with the assembly of the car and, therefore, the painting operations conducted in Mexico were "incidental to the assembly process." Because of the denial of the deduction for these United States components, another part of the fabrication of automobiles in the United States will likely be lost. This cannot be the intent of Congress. Accordingly, I would affirm the judgment of the Court of International Trade.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 92–173)

WASHINGTON INTERNATIONAL INSURANCE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–05–00660

OPINION

[On classification of single-ply modified bitumen roofing membrane, judgment for the plaintiff.]

(Decided October 6, 1992)

Sandler, Travis & Rosenberg, P.A. (*Edward M. Joffe*) for the plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*John J. Mahon*) for the defendant.

AQUILINO, *Judge:* This action, which has been designated a test case pursuant to CIT Rule 84(b), challenges classification by the U.S. customs Service of imported single-ply modified bitumen roofing membrane under textile item 355.25 of the Tariff Schedules of the United States ("TSUS") (1981) ("Webs, wadding, batting, and non-woven fabrics, including felts and bonded fabrics, and articles not specially provided for of any one or combination of these products, all the foregoing, of textile materials, whether or not coated or filled: * * * Of man-made fibers"). The merchandise, bearing the tradename "Rhinohide", is a single-layer waterproofing material, which, according to a Customs analysis report, is composed (by weight) of bitumen (85.5%), ethylene-propylene (9.1%), non-woven polyester (3.2%), grit (2.0%) and polyethylene (0.2%).[1] The plaintiff claims classification of this material under the rubber and plastics products part of TSUS Schedule 7, specifically item 771.43 ("Film, strips, sheets, plates, slabs, blocks, filaments, rods, seamless tubing, and other profile shapes, all the foregoing wholly or almost wholly of rubber or plastics: * * * Other"). Classification under

[1] Witnesses at the trial herein used "bitumen" and "asphalt" interchangeably. *E.g.*, Trial Transcript ("Tr.") at 70 (Herman A. Kaufman for the plaintiff), 94 (Stephen L. Patterson for the plaintiff), 159 (Steven J. Grossman for the plaintiff), 204–05 (Craig Noble for the defendant), 241 (Irving Sporn for the defendant), 288 (Russell A. Long for the defendant). "Atactic polypropylene" and "ethylene-propylene" were similarly used to describe the bitumen modifier. *See, e.g.*, Tr. at 97.

that item would supplant the Service's reliance on item 355.25 by operation of governing headnote 1(vii)[2] to the effect that it does not cover articles specially provided for in Schedule 7 or elsewhere.

Identical tariff provisions and similar merchandise were at issue in *V.G. Nahrgang Co. v. United States,* 6 CIT 85, *reh'g denied,* 6 CIT 210 (1983), *aff'd,* 741 F.2d 1363 (Fed. Cir. 1984). In that action, the plaintiff had also argued that its modified, single-ply roofing material was almost wholly of plastics. However, the Court or International Trade concluded that the plaintiff had failed to adduce even a scintilla of evidence to prove its claim that the mastic portion of the merchandise, a bitumen-polypropylene mixture, was a synthetic plastics material as defined in headnote 2 of Schedule 4, Part 4, Subpart A. *See* 6 CIT at 90. On appeal, Judge Miller, in dissent, agreed that lack of proof was the crux of the case[3], while the majority opinion rejected the arguments on appeal predicated as they were upon (1) chief-value analysis, (2) a contention that the polypropylene alone imparted the essential character of the merchandise and (3) an alternative view that the material should have been classified under TSUS item 771.42 per the principle of similitude. *See* 74 F.2d at 1366–68.

In the face of that opinion, the plaintiff endeavors to prove that Rhinohide is a plastics material within the meaning of the tariff schedules. To do so, it must demonstrate that that product is at least "almost wholly of" plastics, which, in accordance with general headnote 9(f)(iii), required that the "essential character" of the merchandise – which the parties agree is waterproofing[4] – be imparted by plastics, *viz.* the bitumen-ethylene-propylene mastic rather than by all three elements of the product, a question which the *Nahrgang* trial court explicitly did not reach. *See* 6 CIT at 92.

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Headnote 1(b) to Schedule 7, Part 12A stated that "the term '*plastics*' refers to – (i) synthetic plastics materials, as defined in parts 1C and 4A of schedule 4". Headnote 2 to that Schedule 4, Part 4A provided:

> The term "*synthetic plastics materials*", in this subpart, embraces products formed by the condensation, polymerization, or copolymerization of organic chemicals and to which an antioxident, color, dispersing agent, emulsifier, extender * * * may have been added. These products contain as an essential ingredient an organic substance of high molecular weight; are capable, at some stage

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[2] As the defendant notes, the Trade and Tariff Act of 1984, Pub. L. No. 98–573, § 111, 98 Stat. 2943, 2951–52, deleted this headnote from the TSUS, albeit "with respect to articles entered on or after the 15th day after the date of the enactment of this Act." *Id.*, § 195(a), 98 Stat. at 2972. Since the entries herein occurred before that moment, the headnote is applicable. *Cf. Elbe Products Corp. v. United States,* 11 CIT 518, 522, 670 F.Supp. 362, 365 (1987), *aff'd,* 846 F.2d 743 (Fed.Cir. 1988).

[3] *See* 741 F.2d at 1368.

[4] *See, e.g.,* Plaintiff's Brief, p. 24; Defendant's Brief, p. 20.

during processing into finished articles, of being molded or shaped by flow; and are solid in the finished article.[5]

With regard to the materials at issue herein, there is no dispute that the ethylene-propylene component is such a synthetic plastic. Hence, in order for the plaintiff to prevail, it must establish that bitumen is formed either by condensation, polymerization or co-polymerization, contains an organic substance of high molecular weight, is capable of being molded or shaped by flow, and is solid in its finished state.

Regarding the latter two qualities, at trial opposing expert witnesses testified that bitumen could be molded or shaped by flow and also be solid in its finished state. *See, e.g.,* Tr. 149, 162, 274. *See also* 2 Encyclopedia of Polymer Science and at Technology 402 (1970) ("Solid bitumens are plastics in that they can be formed and molded")[6]; Plaintiff's Exhibits 1–3; Defendant's Exhibit A. This ability to "soften when heated, so that they can be formed into shapes, then become rigid on cooling" is a "significant property of most plastics". 9 The New Encyclopaedia Britannica 504 (15th ed. 1986). Bitumen, in fact, was one of the first "plastics" developed. *See* 2 Encyclopedia of Polymer Science and Technology at 410–14; Tr. at 144–45, 151–52.

As for molecular weight, it is the sum of the weights of each atom[7] making up a molecule. Tr. at 32; 11 McGraw-Hill Encyclopedia of Science and Technology 339 (6th ed. 1987). Although defendant's witnesses argued that bitumen's molecular weight cannot be considered "high", each definition of bitumen presented to or considered by the court refers to it as containing substances of high molecular weight. For example, it has been defined by the American Society For Testing and Materials ("ASTM") as "a class of amorphous, black or dark-colored, (solid, semi-solid, or viscous) cementitious substances, natural or manufactured, composed principally of high molecular weight hydrocarbons". 04.04 1986 Annual Book of ASTM Standards 131. *See also* 4 1961 Annual Book of ASTM Standards 655. Similarly, volume 2 of the Encyclopedia of Chemical Technology 284 (3d ed. 1985) states that it "characteristically contain[s] very high molecular weight hydrocarbons called asphaltenes". *See* 04.04 1986 Annual Book of ASTM Standards 131 (defining asphaltene as "a high molecular weight hydrocarbon fraction precipitated from asphalt"). In short, the evidence preponderates in support of the proposition that bitumen is an organic substance of high molecular weight.

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[5] Similarly, headnote 3 to Part 1C defined "plastics materials" as "embrac[ing] products formed by the condensation, polymerization, or copolymerization of organic chemicals and to which plasticizers, fillers, colors, or extenders may have been added."

According to an excerpt from the *Tariff Classification Study* offered by the defendant, Schedule 7's headnote "defines the term 'plastics' more broadly [than headnote 3 to Part 1C and headnote 2 to schedule 4, Part 4A] so as to include certain natural substances as well as the synthetic substances provided for in the chemical schedule." Defendant's Brief, p. 28, quoting the *Tariff Classification Study*, Schedule 7, p. 447.

[6] This work points out, however, that, because of bitumen's dissimilar structural units, it "do[es] not fit the usual definition of a polymer." *See* Tr. at 40.

[7] Atomic weight is the mass of an atom and "is approximately equal to the total number of nucleons, protons and neutrons, composing the nucleus." 11 McGraw-Hill Encyclopedia of Science & Technology 339 (6th ed. 1987).

The difficult, remaining question is whether condensation, polymerization or co-polymerization occurs in that substance's formation. These phenomena can be described simply as the combining of small molecules, "monomers", into chain-like, larger molecules, "polymers". *See, e.g.,* Concise Encyclopedia of Chemical Technology 934 (1985); 15 The New Encyclopaedia Britannica 782 (15th ed. 1986). Condensation is defined by ASTM as a "chemical reaction in which two or more molecules combine with the separation of water or some other simple substance. * * * (See also Polymerization)". 9 1961 Annual Book of ASTM Standards 797. The definition of co-polymerization refers to a polymerization reaction involving two or more monomers. *See id.* at 798, 803.

The bitumen in Rhinohide is apparently derived via two steps. *See* Tr. at 183–84, 197–98. First, in a process known as distillation or straight reduction, crude oil is heated and injected into a fractionating column, where lighter elements or "fractions" separate, leaving an asphalt residuum. *See id.* at 38, 183. *See also* 2 McGraw-Hill Encyclopedia of Science & Technology 110–12 (6th ed. 1987); 6 McGraw-Hill Encyclopedia of Science & Technology 361–66 (6th ed. 1987). Testimony as to the occurrence of condensation, polymerization or co-polymerization during this process was conflicting. One of plaintiff's experts, Dr. Grossman, for example, stated that the high temperature used in straight reduction gives "rise to reactions referred to as pyrolisis [which] refers to a high temperature bond braking and bond formation reaction." Tr. at 157–58. *See also id.* at 143, 197. Another expert for the plaintiff, Dr. Kaufman, testified that, as the molecules cool, they recombine, forming new molecules. *Id.* at 39. Defendant's witnesses, Messrs. Sporn and Long, however, argued that the isolation does not involve a chemical reaction[8], although Mr. Sporn later admitted that "bitumen may be formed in part by a condensation process"[9] and that "some low degree of polymerization or co-polymerization" was involved in its formation as well. *Id.* at 273. The second step is air-blowing[10], which

> consists of dehydrogenation with concurrent formation or water as a by-product. The resulting products then combine to form compounds of higher molecular weights. The air-blowing operation is carried out in vertical or horizontal vessels provided either with

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[8] *See* Tr. at 242, 296–97.

[9] *Id.* at 247.

[10] The government contends that the testimony presented by the plaintiff as to this procedure should be disregarded "in view of the more authoritative testimony" of Messrs. Noble and Long that the asphalt used in Rhinohide is not air-blown. Defendant's Brief, D. 32 n. 28. Those defense witnesses, however, could only state unequivocally that the material used in their product, U.S. Intec's "brai/sp–4", was not air-blown. *See* Tr. at 231, 290.

Although sold for the same purposes, their product is composed of a mastic of approximately 70% bitumen and 30% atactic polypropylene, plus a polyester liner.

Mr. Long further testified that air-blown asphalt could not be used and that he was not aware of any roofing membrane using such asphalt. Tr. at 290–91. However, Mr. Patterson, an expert witness for the plaintiff, testified that the bitumen used in roofing in this country is indeed air-blown, *id.* at 107–08, and his testimony is supported by several treatises which refer to the use of such asphalt in roofing materials. *See, e.g.,* Concise Encyclopedia of Chemical Technology 138 (1985); 2 McGraw-Hill Encyclopedia of Science & Technology 112 (6th ed. 1987) ("Air-blown asphalt is used mainly for roofs"). One source asserts, in fact, that air-blowing renders the asphalt "more resistent to weather and changes in temperature" and also that "[a]ir-blown asphalts of different viscosities and flow properties with added fillers, polymers, solvents and in water emulsions provide products for many applications in the roofing industry." 3 Encyclopedia of Chemical Technology 296 (3d ed. 1985).

> direct heat or, more efficiently, with circulating tube heaters. The asphalt stocks are heated to 400–500 [degrees Fahrenheit] and contacted with large volumes of air, averaging about 20 ft^3/(ton)(min), which are diffused throughout the heated mass.

2 Encyclopedia of Polymer Science and Technology 406. *See also* Tr. at 107–08, 198; 3 Encyclopedia of Chemical Technology 296 (3d ed. 1985); 2 McGraw-Hill Encyclopedia of Science & Technology 112, Table 2 (6th ed. 1987). According to volume 3 of the Encyclopedia of Chemical Technology at page 299, during this process "oxygen in the air combines with the hydrogen in the asphalt to evolve water vapor", "dehydrogenation and polymerization are involved", and additional asphaltenes are formed. Although Mr. Long testified that polymerization does not occur during air-blowing, he did state that the process increases the polarity of the molecules, thus increasing intermolecular attraction, creating more of the high-molecular-weight hydrocarbons, asphaltenes, and hardening the asphalt. *See* Tr. 293–94.

To the extent that polymerization can be described as "*any* process in which relatively small molecules * * * combine chemically to produce a very large chain-like or network molecule"[11], the plaintiff has demonstrated that it occurs during the manufacture of bitumen for use in Rhinohide.

In the light of the evidence at hand, the court thus concludes that the bitumen at issue herein is in fact a "synthetic plastics material" within the meaning of the tariff schedules.

II

The crux of defendant's position thus is that Rhinohide cannot be considered an article "almost wholly of" plastics because its essential character is imparted by the nonwoven polyester liner, which is but 3.2 percent of its weight.

Bitumen, which does occur in nature, has been used as a waterproofing agent for millenia. Volume 1 of The New Encyclopaedia Britannica 637 notes, for example, that it was a "water stop" between brick walls in Pakistan around 3,000 B.C. *Compare* Tr. at 95 (technology using built-up layers of bitumen with felt for roofing is a hundred years old and still a force in the market-place); 2 Encyclopedia of Polymer Science and Technology 410 (1970). The ethylene-propylene component of the membrane adds flexibility, strength and improves quality and durability. *See* Tr. at 103, 163, 219–20. The liner also adds strength, durability and elasticity, which permit the membrane to be rolled. *Id.* at 104, 117–18, 312. And witnesses for both the plaintiff and the defendant testified that modified, single-ply bitumen roofing membranes, including some Rhinohide and a version of brai, are also manufactured with liners of fiberglass. *See id.* at 205, 227, 334–35; Plaintiff's Exhibit 6. *But see* Tr. at 220–21. However, as has been observed in a case like this:

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[11] 9 The New Encyclopaedia Britannica 580 (15th ed. 1986) (emphasis added).

> Discernment of the essential character of articles is not likely to develop into an exact science but, insofar as some consistency and predictability is possible, it is likely to be found in concentrating on whether the material in question supplies the distinctive feature of the article and not in examining all the characteristics of the article and, if some other material contributes important characteristics, declining to give one material the primacy which its role deserves. General headnote 9(f) (iii) acknowledges the possibility that significant quantities of some other materials may be present and implicitly recognizes that those other materials will impart something to the character of the article.
>
> Therefore, the existence of other materials which impart something to the article ought not to preclude an attempt to isolate the most outstanding and distinctive characteristic of the article and to detect the component material responsible for that "essential characteristic."

Canadian Vinyl Industries, Inc. v. United States, 76 Cust. Ct. 1, 2–3, C.D. 4626, 408 F.Supp. 1377, 1378 (1976) (footnote omitted), *aff'd*, 555 F.2d 806 (CCPA 1977), quoted in *Nahrgang*, 6 CIT at 89.

While the polyester liner does add to the merchandise, the evidence adduced establishes overwhelmingly that it is the bitumen which provides the paramount characteristic of Rhinohide – waterproofing. And the court concludes that that product, including as it does the ethylene-propylene to enhance the physical characteristics of the bitumen, which together add up to 94.6 percent of its weight, can be considered "almost wholly of" plastics, correctly classifiable under TSUS item 771.43.[12] Its essence is hardly webs, wadding, batting, and non-woven fabrics, including felts and bonded fabrics, and articles not specially provided for of any one or combination of these products, all the foregoing, of textile materials, whether or not coated or filled, as claimed by Customs. In other words, this court is unable to conclude that this roofing material nevertheless lies within the ambit of the textile fibers and products contemplated by TSUS Schedule 3.

III

In sum, the plaintiff has overcome the presumption of correctness of customs classification of the merchandise under item 355.25 of the TSUS, and judgment must therefore enter in its favor.

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[12] Another provision referred to by the plaintiff is TSUS item 523.91 ("Articles of asphalt or tar for roofing or siding"), but the government contends that this reference is "merely a statistical breakout demonstrating one type of product". Defendant's Brief, p. 39. Be that as it may, either primary alternative pressed now by the parties in this case prevails over that provision, as headnote 1 to Schedule 5, Part 1K provides that "[t]his subpart covers mineral substances, not provided for elsewhere in the schedules". *See V.G. Nahrgang Co. v. United States*, 741 F.2d 1363, 1368 (Fed. Cir. 1984).

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESS
C92/169 10/6/92 Aquilino, J.	E. Gluck Corp.	83–9–01383	716.09–716 715.05, e Various
C92/170 10/6/92 Aquilino, J.	E. Gluck Corp.	87–1–00069	716.09–716 715.05, e Various
C92/171 10/6/92 DiCarlo, J.	Mattel, Inc.	87–11–01120	737.95 9.6% 8.3% 7.0%
C92/172 10/6/92 DiCarlo, J.	Mattel, Inc.	86–2–00265	737.95 10.9%

FICATION DECISIONS

SSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
16.45, etc. rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (Fed. Cir. 1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (Fed. Cir. 1982)	New York Quartz analog watches, etc.
16.45, etc. rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (Fed. Cir. 1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (Fed. Cir. 1982)	New York Quartz analog watches, etc.
	912.20 Free of duty	Mattel, Inc. *v.* U.S. 733 F.Supp. 1503 (1990) *rev'd*, 926 F.2d 1116 (1991)	New York Toys, etc.
	912.20 Free of duty	Mattel, Inc. *v.* U.S. 733 F.Supp. 1503 (1990) *rev'd*, 926 F.2d 1116 (1991)	Los Angeles Toys, etc.

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED
C92/173 10/6/92 Restani, J.	Sea-Land Service, Inc.	88–07–00518	661.35 Various rates
C92/174 10/9/92 Carman, J.	BBC Brown Boveri, Inc.	90–6–00305	661.06 5%
C92/175 10/9/92 Tsoucalas, J.	Liz Claiborne Accessories, Inc.	90–6–00274–S	4202.32.20 20%

DECISIONS – Continued

	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
	Merchandise were "instruments of international traffic" pursuant to 19 U.S.C. 1322(a) and 19 C.F.R. 10.41a(1) and as such, were not subject to entry or duty until diverted to unpermitted "point-to point local traffic" within the United States or otherwise withdrawn in the United States from their use in international traffic.	Agreed statement of facts	Anchorage etc. Refrigerated freight containers
	661.10 3.5%	Agreed statemtnt of facts	New York Turbo-chargers, etc.
	4820.10.40 Free of duty	Agreed statement of facts	New York Address books, etc.

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